

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FCC Consultative Role in the)	
Broadband Provisions of the)	GN Docket No. 09-40
Recovery Act)	

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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I. INTRODUCTION

The Federal Communications Commission (“FCC” or “Commission”) seeks comment¹ concerning the FCC’s consultative role in the broadband provisions of the American Recovery and Reinvestment Act of 2009.² The New Jersey Division of Rate Counsel (“Rate Counsel”) welcomes the opportunity to submit these comments.

A. INTEREST OF RATE COUNSEL IN THE INSTANT PROCEEDING.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel’s continued participation and interest in implementation of the

¹ / “Comment Procedures Established Regarding the Commission’s Consultative Role in the Broadband Provisions of the Recovery Act,” GN Docket No. 09-40, released March 24, 2009, DA 09-668, citing American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 State (2009) (“Public Notice”).

² / American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 State (2009) (“Recovery Act”).

Telecommunications Act of 1996³ and implementation of the Recovery Act. The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will “promote efficiency, reduce regulatory delay, and foster productivity and innovation” and “produce a wider selection of services at competitive market-based prices.”⁴ The implementation of the Recovery Act will affect New Jersey’s competitive landscape.

B. SUMMARY OF ISSUES FOR COMMENT

As explained by the FCC in its Public Notice, the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”) will administer the Broadband Technologies Opportunities Program (“BTOP”), which will provide grants for developing and expanding broadband services, and the Rural Utilities Service (“RUS”) will continue to administer its programs of broadband loans, loan guarantees, and grants with additional funds.⁵ Although the FCC does not have any funds for grants or loans under the Recovery Act, Congress has directed NTIA to consult with the FCC on five significant areas that likely will inform the way in which broadband grants and loans are made:

- The definition of “unserved area,”
- The definition of “underserved area,”
- The definition of “broadband,”

³ / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the 1996 Act,” or “the Act,” and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

⁴ / *N.J.S.A.* 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

⁵ / Public Notice, citing Recovery Act § 6001(a) and Recovery Act, 123 Stat. at 118.

- The non-discrimination obligations that will be part of the contractual obligations of the BTOP grants, and
- The network interconnection obligations that will be part of the contractual obligations of the BTOP grants.

II. DISCUSSION OF ISSUES

A. DEFINITION OF “UNSERVED AREA” AND “UNDERSERVED AREA.”

As set forth in Recovery Act § 6001(b)(1): “The purposes of the [BTOP] are to . . . provide access to broadband service to consumers residing in unserved areas of the United States.”⁶ Also, as set forth in Recovery Act § 6001(b)(2): “The purposes of the [BTOP] are to . . . provide improved access to broadband service to consumers residing in underserved areas of the United States.”⁷

Rate Counsel recommends that NTIA and RUS define an “unserved” area as any area where 70 percent of the households do not have access to cable Internet services. By way of example, if cable Internet service is available to 75% of households in a municipality, the municipality would not be an “unserved area.” A municipality, where cable Internet service is available to 70% or less of households, would be defined as an “unserved area.” An “underserved” area should be defined as any area other than an “unserved” area where Internet subscription, based upon the total Internet subscribers served by wireline and cable, even though available, is at or below 70%. Internet

⁶ / See also Public Notice stating, “see also Conf. Rep. 111-16, at 776 (‘The [Recovery Act] does not define such terms as ‘unserved area’ ‘underserved areas’ and ‘broadband.’ The Conferees instruct the NTIA to coordinate its understanding of these terms with the FCC, so that the NTIA may benefit from the FCC’s considerable expertise in these matters.’)”

⁷ / See also Public Notice, citing Conf. Rep. 111-16, at 776.

subscription should not include dial-up service or satellite (hereinafter referred to the “70/70” Test).

The 70/70 test proposed by Rate Counsel is consistent with the 1996 Telecommunications Act, which establishes a similar test authorizing the FCC to adopt rules to ensure diversity for cable consumers.⁸ In addition, Rate Counsel’s 70/70 test will further Section 706 of the 1996 Act that calls upon the Commission and states to promote advanced telecommunications capabilities, broadband, to all Americans including primary and secondary schools.⁹

The proposed definitions would enable NTIA and RUS to identify and target Recovery Act funds so that broadband facilities are deployed (1) to households in “unserved” areas that lack access now to broadband facilities, and (2) to “underserved” areas where households in urban and rural areas that may have access to broadband facilities but do not currently subscribe to the service for reasons other than a lack of access (e.g. low income customers and seniors).

In New Jersey, there are many communities, both urban and non-urban, where subscription to the Internet is low even though more than 70% of the households have access to cable Internet facilities.¹⁰ For example, only 42% of households in the Newark system subscribe to cable service; and in the Jersey City system, only 47% subscribe to

^{8/} See 47 U.S.C. § 532(g) which establishes a 70/70 test which if satisfied permits the Federal Communications Commission to adopt rules to ensure diversity of information resources.

^{9/} See 47 U.S.C. §157 nt.

^{10/} The systems that are above or below the average are identified in New Jersey Board of Public Utilities, Office of Cable Television, Cable Fact Report for 2005. There are 39 cable television systems serving 562 municipalities out of 566 municipalities. More detailed information can be obtained from the Office of Cable Television.

cable service.¹¹ Reasons other than physical access are clearly preventing these residents from gaining access to broadband. Thus, these are underserved areas where consumers need improved access to which ARRA funding should be targeted.

If broadband service is not affordable or accessible to consumers within a particular area, then broadband service cannot be considered “available” to them.¹² If, for example, consumers lack computers, the technical knowledge, or the resources to subscribe to broadband, they should be considered underserved.¹³ As Rate Counsel stated last year in comments submitted to the FCC: “Although, for example, New Jersey may lack high-cost areas, there are many areas in New Jersey that lack broadband access that is affordable to the consumers in those communities.”¹⁴

The adoption of Rate Counsel’s “70/70” Test would enable NTIA and RUS to identify “unserved” and “underserved” areas and target its ARRA funds appropriately. This framework promotes the Congressional objective to expand the development of broadband throughout the country. The framework is also easy to administer and can be applied based upon information that is currently available, without having to wait until the broadband mapping initiatives contemplated by the Recovery Act are completed.

¹¹ / Cable Facts 2005, New Jersey Board of Public Utilities, at 32 (available at <http://www.bpu.state.nj.us/bpu/pdf/cablepdfs/cablefacts2005.pdf>).

¹² / See Wired Less, Disconnected in Urban America, Freepress, April 7, 2009, http://www.freepress.net/files/Wired_Less_Disconnected_in_Urban_America.pdf

¹³ / Also, if there is insufficient competition (without compensating regulatory oversight), areas are inadequately served, and, therefore, can be considered underserved. However, by this definition, all Americans are underserved.

¹⁴ / Rate Counsel initial comments, April 15, 2008, WC Docket No. 05-337, CC Docket No. 96-45

Universal Service Should be expanded to include Broadband

Rate Counsel therefore welcomes the Commission's efforts to advise NTIA as it embarks on an ambitious and important broadband grant program. Rate Counsel has previously supported inclusion of affordable broadband in supported services, for example, stating in comments filed in the 2006 USF proceeding that "[i]n order to fulfill the nation's objective of universal service, advanced services must be available to and affordable by all consumers, regardless of geography or income."¹⁵ In 2005, Rate Counsel also stated, among other things:

The societal implications of the technology haves and have-nots. Based on the [Rate Counsel's] comprehensive examination of information provided in state and federal proceedings regarding mega-mergers between SBC and AT&T, and between Verizon and MCI, [Rate Counsel] is concerned that the merged companies' priorities will veer even further toward big business, enterprise, and global customers and further away from the historic mission of providing basic local exchange service customers. Simultaneously, in pursuit of deploying fiber to the home, the companies will be targeting affluent, technologically-savvy households. The Commission should consider carefully the implications of a society with such widely disparate access to communications technology.

¹⁵ / In the Matter of High-Cost Universal Service Support, WC Docket No. 05-337; Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Comments of the New Jersey Division of Rate Counsel, March 27, 2006, at 25; See, also In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Comments of the New Jersey Division of The Ratepayer Advocate, September 30, 2005 ("Rate Counsel 2005 USF Initial Comments"), at 26; See In the Matter of Consumer Protection in the Broadband Era, WC Docket No. 05-271, Initial Comments of the New Jersey Division of the Ratepayer Advocate, Initial Comments, January 17, 2006; In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Comments of the New Jersey Division of Rate Counsel, May 16, 2007; In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, Comments of the New Jersey Division of Rate Counsel, June 15, 2007, and Reply Comments of the New Jersey Division of Rate Counsel, July 16, 2007. Rate Counsel has also advocated affordable broadband access in its numerous comments submitted in the FCC's various universal service proceedings, most recently, in initial and reply comments submitted

Disparate levels of access to the Internet by diverse demographic groups continues to provide evidence of a sobering digital divide that conflicts with the directive in the 1996 Act that “Consumers in all regions of the Nation, including low-income consumers...should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.” As the Commission recently stated, “[t]he availability of the Internet has had a profound impact on American life. This network of networks has fundamentally changed the way we communicate.” Not only should the Commission consider how best to promote universal service in rural areas, but also the Commission should evaluate the disparate levels of access to broadband and to the Internet throughout the country.¹⁶

B. DEFINITION OF “BROADBAND.”

The definition of broadband should be linked to specific minimum download and upload speeds, and should evolve as technology evolves.

The definition of broadband should be pegged to specific minimum download and upload speeds, with the definition evolving as technology evolves. Absent such a definition, policy analyses and discussions will be less meaningful as the nation seeks to

¹⁶ / Rate Counsel 2005 Initial USF Comments, citing to In the Matter of Transfer of Control filed by SBC Communications Inc. and AT&T Corp., FCC WC Docket No. 05-65; Joint Petition of SBC Communications Inc. and AT&T Corp., Together with its Certificated Subsidiaries for Approval of Merger, New Jersey Board of Public Utilities Docket No. TM05020168; In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, FCC WC Docket No. 05-75; Joint Petition of Verizon Communications Inc. and MCI, Inc. for Approval of Merger, New Jersey Board of Public Utilities Docket No. TM05030189; In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Policy Statement, released September 23, 2005; and “Internet Access Disparity Hits Kids Hardest, Report Says,” TR Daily, September 27, 2005; Are We Really A Nation Online? Ethnic and Racial Disparities in Access to Technology and Their Consequences, Report for the Leadership Conference on Civil Rights Education Fund Robert W. Fairlie, University of California, Santa Cruz and National Poverty Center, University of Michigan; “A Nation Online: Entering the Broadband Age,” US Department of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, September 2004, Appendix Tables 1 through 4, available at <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.doc>; Harris Interactive, Consumers and Communications Technologies: Current and Future Use, prepared for National Consumers League, final report June 29, 2005, at page 7.

measure progress in establishing a national broadband network with affordable service for all.

The definition of broadband service should relate to the way in which the NTIA and RUS apply the definition to decide where to allocate broadband grant monies. In terms of reasonable technological expectations for consumers in the early 21st century, broadband should be defined to be offered at speeds of at least 3 mbps downstream and 1 mbps upstream, with that definition evolving frequently. However, in determining where to provide grants, those communities that do not even have broadband access at one of the three lowest tiers reported in the new Form 477 (the first tier is greater than 200 kbps but less than 768 kbps; the second tier is equal to or greater than 768 kbps but less than 1.5 mbps; and the third tier is between 1.5 mbps and 3.0 mbps) should be given priority for grants over those communities that have access to “low” broadband speeds (between 200 kbps and 3 mbps).

The establishment of a minimum threshold for speed is critically important to prevent future waves of “digital divides” where some communities’ broadband access is vastly superior to other communities’ broadband access. Rate Counsel is encouraged that the FCC has taken steps to improve its ability to monitor the speed of broadband that is deployed throughout the country, which, in turn will enable it to periodically revisit the definition of broadband. Last year, the FCC released its Report and Order and Further Notice of Proposed Rulemaking in the broadband data gathering docket, WC Docket No. 07-38 (“Form 477 Order”).¹⁷ In the *Form 477 Order*, the Commission updated the

¹⁷ / *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership,*

reporting categories for broadband service, replacing the five tiers that describe the maximum connection speed¹⁸ to eight speed tiers.¹⁹ Additionally, in recognition of the growing importance of upload speeds as well as download speeds, the Commission requires service providers to categorize subscribers based on both download and upload speeds. The Commission declined to create a system that would automatically adjust the speed tiers to reflect improving technology,²⁰ but instead stated that it would review the speed tiers every two years and make any adjustments necessary.²¹ Rate Counsel recommends that the analyses and findings undertaken by the Commission based on its collection of the revised Form 477 inform and serve as the basis for the definition of broadband that it recommends to NTIA and RUS.²²

C. NON-DISCRIMINATION AND NETWORK INTERCONNECTION OBLIGATIONS

Broadband networks deployed with public monies should be open and broadband providers should be required to commit to non-discrimination.

The Recovery Act § 6001(j) states: “Concurrent with the issuance of the Request for Proposal for grant applications pursuant to this section, the Assistant Secretary shall, in coordination with the Commission, publish the non-discrimination and network

WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, released: June 12, 2008 (“Form 477 Order”).

¹⁸ / The previous five tiers included: 200 kbps to 2.5 mbps, 2.5 mbps to 10 mbps, 10 mbps to 25 mbps, 25 mbps to 100 mbps, and greater than 100 mbps.

¹⁹ / The new speed tiers are: (1) greater than 200 kbps but less than 768 kbps; (2) equal to or greater than 768 kbps but less than 1.5 mbps; (3) equal to or greater than 1.5 mbps but less than 3.0 mbps; (4) equal to or greater than 3.0 mbps but less than 6.0 mbps, (5) equal to or greater than 6.0 mbps but less than 10.0 mbps; (6) equal to or greater than 10.0 mbps but less than 25.0 mbps; (7) equal to or greater than 25.0 mbps but less than 100.0 mbps; and (8) equal to or greater than 100 mbps. *Form 477 Order*, at para. 20.

²⁰ / *Id.*, at para. 22.

²¹ / *Id.*, at para. 21.

²² / The first filings under the revised Form 477 guidelines were due to be filed by March 16, 2009. DA 09-573, “Wireline Competition Bureau Announces New Tutorial to Assist Form 477 Filers; Over 2100 Filings Have Been Submitted as Complete to Date,” WC Docket No. 07-38, released: March 11, 2009.

interconnection obligations that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission's broadband policy statement (FCC 05-15[1], adopted August 5, 2005)."

Rate Counsel has addressed non-discrimination and network interconnection obligations in various FCC proceedings,²³ and urges the Commission to continue its efforts to establish and enforce appropriate non-discrimination and network interconnection obligations. Rate Counsel has consistently opposed the possibility of the industry acting as gatekeepers to the nation's Internet.²⁴

Regulatory intervention is essential to counter-balance the economic incentive and the potential for broadband service providers to engage in anticompetitive behavior by limiting access, or by degrading service that they offer to Internet application providers whose products compete with their products. Rate Counsel reiterates its position here:

- Net neutrality is essential to the continuing deployment of innovative, decentralized applications and information sources, which rely on open access to the Internet;

²³ / See, e.g., Rate Counsel initial and reply comments in WC Docket No. 07-52 (June 15, 2007 and July 16, 2007), and more recently on February 28, 2008 (regarding Comcast's network management practices).

²⁴ / More than three years ago, Rate Counsel stated in its filing in the Commission's WC Docket No. 05-271, *Consumer Protection in the Broadband Era*: "In effect, the RBOCs may attempt to create a two-tiered Internet, where their own services are offered to consumers at high quality and high speed, while signals from competing companies are intentionally degraded or slowed." *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271, Rate Counsel initial comments, January 17, 2006, at 22. Rate Counsel also recommended that "[t]he two-tiered system that Verizon and other ILECs propose with premium prices for premium access to the Internet should be rejected." *Id.*, at 7; see generally, *id.*, at 21-23.

- Although Rate Counsel welcomes diverse technological platforms, consumer choice of broadband providers is not yet sufficient to ensure that broadband industry practices benefit consumers;
- Regulatory intervention is necessary to prevent the cable-telecommunications duopoly from exerting anticompetitive control over the information that consumers upload and download over the Internet; and
- The Commission should ensure that broadband deployment does not erode the consumer protection policies and rules that federal and state regulators have devoted years to establishing.²⁵

The Commission should adopt the “fifth” Internet policy as an enforceable measure for all providers.

In 2005, the Commission issued a Policy Statement, which propounded four principles to guide broadband regulation:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to

²⁵ / Rate Counsel requests that the Commission consider the comments filed by Rate Counsel on January 17, 2006, and March 1, 2006 in the Commission’s broadband consumer protection proceeding as the Commission deliberates on the issues under investigation in this proceeding. *In the Matter of Consumer Protection in a Broadband Era*, WC Docket No. 05-271.

competition among network providers, application and service providers, and content providers.²⁶

Verizon's commitment to following the four principles set forth in the Commission's Broadband Policy Statement, which was a condition of the FCC's approval of Verizon's acquisition of MCI, expired in January 2008.²⁷ AT&T's similar commitment (that the merged company will refrain from behavior contrary to the principles set forth in the Commission's *existing* Broadband Policy Statement) expires in June 2009.²⁸ AT&T's commitment to a "fifth" principle, specifically "*not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination*" expired in December 2008.²⁹

In 2006, in its comments submitted regarding the Commission's investigation of the AT&T/BellSouth merger, Rate Counsel stated that "[t]he proposed merger jeopardizes net neutrality, and, therefore, the Commission should condition any approval of the proposed transaction on a commitment to net neutrality, without a sunset provision."³⁰ Subsequently, in its decision approving the merger of AT&T and

²⁶ / *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-151, Policy Statement, 20 FCC Rcd 14986 (2005), at Rcd 14988 ("Policy Statement"), ¶ 4.

²⁷ / *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, Rel. November 17, 2005, at Appendix G.

²⁸ / *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, Rel. March 26, 2007 ("AT&T/BellSouth Merger Order"), at Appendix F.

²⁹ / *Id* (emphasis added).

³⁰ / *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, Federal Communications Commission WC Docket No. 06-74, Rate Counsel initial comments, June 5, 2006, at 21.

BellSouth, the Commission conditioned its approval of the transaction upon a commitment that the merged company would not only refrain from behavior contrary to the principles set forth in the Commission's existing *Policy Statement*,³¹ but also, more significantly, would abide by a "net neutrality" condition. The Commission described the commitment to the "fifth" policy, which had a sunset clause, in the following manner:

This commitment shall apply to AT&T/BellSouth's wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, defined as the point of interconnection that is logically, temporally or physically closest to the customer's premise where public or private Internet backbone networks freely exchange Internet packets.

This commitment shall sunset on the earlier of (1) two years from the Merger Closing Date, or (2) the effective date of any legislation enacted by Congress subsequent to the Merger Closing Date that substantially addresses "network neutrality" obligations of broadband Internet access providers, including, but not limited to, any legislation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic.³²

This condition was significant for several reasons. At the time, the provision was the only government-mandated directive for net neutrality in the United States, and, therefore, represented significant progress for consumer protection in the emerging broadband era, protection which should be extended universally to all consumers. However, the two-year sunset provision meant that the protection has already expired (as of December 2008).³³ Therefore, timely action is essential to provide more long-lasting net neutrality. Also, because the condition protected only AT&T's consumers, it was

³¹ / *AT&T/BellSouth Merger Order*, at Appendix F, at 154..

³² / *Id.*

³³ / AT&T Press Release, "AT&T and BellSouth Join to Create a Premier Global Communications Company, Deal Consolidates Ownership of Cingular Wireless; BellSouth and Cingular Brand Transition to Begin Soon," San Antonio, Texas, December 29, 2006, <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22860>

insufficient because there was no comparable protection for consumers beyond AT&T's footprint. Comcast's network management practices have also been the subject of FCC oversight.³⁴ Consumers continue, however, to lack national, network neutrality protection. As part of its national broadband plan, the Commission should construct a fifth, enforceable, broadband principle ensuring neutral treatment of content for all Americans. In the interim, the Commission should advise NTIA and RUS to require recipients of public broadband monies to commit to abide by the "fifth" Internet principle.

Rate Counsel supports the rationale set forth in the concurring statements to the FCC's approval of the AT&T/BellSouth merger, which explain the importance of net neutrality.³⁵ Rate Counsel urges the FCC to advise NTIA and RUS to adopt the 5th Internet principle of net neutrality as a requirement for receiving any public monies distributed through the Recovery Act.

³⁴ / *In re Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC's Internet Policy Statement & Does Not Meet an Exception for "Reasonable Network Management,"* Mem. Op. and Order, FCC 08-183 (Aug. 20, 2008) ("Order"); see letter/compliance plan submitted by Comcast dated September 19, 2008.

³⁵ / *See AT&T/BellSouth Merger Order*, Concurring Statement of Commissioner Jonathan S. Adelstein stating, among other things, "One hallmark of this Order is that it applies explicit, enforceable provisions to preserve and protect the open and interconnected nature of the Internet, including not only a commitment to abide by the four principles of the FCC Internet Policy Statement but also an historic agreement to ensure that the combined company will maintain a neutral network and neutral routing in its wireline broadband Internet access service. Together, these provisions are critical to preserving the value of the Internet as a tool for economic opportunity, innovation, and so many forms of civic, democratic, and social participation." *AT&T/BellSouth Merger Order*, at 176. *See also*, Concurring Statement of Commissioner Michael J. Copps, which includes the following: "My response is that in an age when the Internet is increasingly controlled by a handful of massive private network operators, the source of centralized authority that threatens the Internet has dramatically shifted. The tiny group of corporations that control access to the Internet is the greatest threat to Internet freedom in our country today. If left unchecked, the merged entity resulting from today's decision would have gained the ability to fundamentally reshape the Internet as we know it – in whatever way best serves its own profit motives, rather than preserving the integrity and the effectiveness of the Internet." *AT&T/BellSouth Merger Order*, at 171.

Any broadband “pipes” that are funded with public monies should be available for open use.

The United States has much “catch-up” to undertake to achieve comparable standing with other countries in the world.³⁶ As we embark on a \$7 billion broadband stimulus program, it is critically important that the “pipes” that are deployed with public monies be available for the broadest possible use, rather than being limited to “single-use” applications (e.g., only education, only health care). Particularly where public monies are being expended, guidelines should clearly enable broad access to and use of the newly deployed broadband infrastructure. Rate Counsel urges the FCC to advise NTIA and RUS to prevent the creation of unnecessary restrictions on the use of the nation’s broadband infrastructure. Instead, investment should be made, and broadband deployed in a manner that enables multiple uses wherever possible to ensure that the public funds maximize societal benefits.

³⁶ / See, e.g., *The New York Times*, “World’s Fastest Broadband at \$20 Per Home,” Saul Hansell, April 3, 2009.


III. CONCLUSION

Rate Counsel urges the Commission to consider Rate Counsel's proposals as the Commission develops its advice to the NTIA and RUS in their administration of broadband grants and loans.

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SUMMARY

Rate Counsel's specific recommendations on the five issue areas are the following:

Definition of unserved: Rate Counsel recommends that NTIA and RUS define an "unserved" area as any area where 70 percent of the households do not have access to cable Internet services. By way of example, if cable Internet service is available to 75% of households in a municipality, the municipality would not be an "unserved area." A municipality, where cable Internet service is available to 70% or less of households, would be defined as an "unserved area."

Definition of underserved: An "underserved" area should be defined as any area other than an "unserved" area where Internet subscription, based upon the total Internet subscribers served by wireline and cable, even though available, is at or below 70%. Internet subscription should not include dial-up service or satellite (hereinafter referred to the "70/70" Test).

Definition of broadband: The definition of broadband service, in the context of the Recovery Act, should relate to the way in which NTIA and RUS are using the definition to decide where to allocate broadband grant monies. In terms of reasonable technological expectations for consumers in the early 21st century, broadband should be defined to be offered at speeds of at least 3 mbps downstream and 1 mbps upstream, with that definition evolving frequently. However, in determining where to provide grants, those communities that do not even have broadband access at one of the three lowest tiers (between 200 kbps and 3 mbps) reported in the new Form 477 should be given priority for grants. The national goal, however, should be to seek deployment that does not leave Americans with tortoise-speed broadband.

Network non-discrimination: NTIA and RUS should establish clear network non-discrimination requirements, and specifically require any recipients to abide by the FCC's five Internet principles.

Network interconnection: Particularly because the NTIA is awarding public monies for broadband, it is critically important that any broadband networks subsidized with these grants be deployed in an open manner to facilitate the greatest possible societal benefit from the deployment.